

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

In the Matter of All Licenses Held by Speedway
SuperAmerica Store, LLC d/b/a Speedway
SuperAmerica Store, for the Premises Located at
390 Maryland Avenue East, Saint Paul.

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing on July 30, 2009, before Administrative Law Judge Barbara L. Neilson, in Conference Room 220 of the City Hall/Courthouse Building, 15 West Kellogg Boulevard, St. Paul, MN 55102. The OAH record closed at the conclusion of the hearing on July 30, 2009.

Rachel Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, appeared for the City of St. Paul's Department of Safety and Inspections (DSI).

The Speedway SuperAmerica Store (Licensee) was not represented by counsel. Instead, Mark Lindsey, the Licensee's district manager, appeared on the Licensee's behalf.

STATEMENT OF THE ISSUES

1. Did the Licensee violate Minnesota Rules part 4626.0395 by not maintaining hot readily perishable foods at 140 degrees Fahrenheit or higher?
2. If so, is the proposed \$200 penalty a reasonable licensing sanction under the St. Paul Legislative Code?

The Administrative Law Judge concludes that the alleged violations occurred and that the City may take the proposed adverse action against the Licensee's licenses.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Speedway SuperAmerica Store #4038 (Licensee) is a gas station and convenience store located at 390 Maryland Avenue East in St. Paul. The

store is licensed by the City of St. Paul to sell gas, grocery items, perishable foods, and cigarette and tobacco products.¹

2. Among other perishable foods, the store sells hot dogs to which customers can add chili and cheese toppings. The chili and cheese products are supplied to the store in plastic bags that are shelf stable for 12 months prior to opening. The bags are placed inside a plastic container that has a heating device and are dispensed through two tubes.²

3. On April 10, 2009, David Weisberg, an Environmental Health Specialist with the City of St. Paul's Department of Safety and Inspections (DSI), conducted an inspection of the Licensee's store. Daniel Stower was the Licensee's manager on duty that day. Mr. Stower is a certified food manager. During the course of his inspection, Mr. Weisberg identified several "non-critical" food code violations at the store, such as an uncovered waste receptacle in the restroom and an unsecured drain cover in the back room, and one "critical (major)" violation. Critical major violations are those violations of the food code that place consumers at a high risk of food-borne illness.³

4. The critical (major) food code violation identified by Mr. Weisberg concerned the temperature of the Licensee's chili and cheese products. By law, hot "potentially hazardous" foods are to be maintained at 140 degrees Fahrenheit or higher.⁴ Most cheese and meat products are considered potentially hazardous because they are capable of supporting organisms that can produce illness.⁵ The Licensee agreed that the chili and cheese products dispensed in its store are potentially hazardous foods and did not dispute the applicability of the 140 degree temperature requirement to those products.⁶

5. During his April 10, 2009, inspection, Mr. Weisberg first noted that the thermometer on the outside of the holding container for the chili and cheese products registered 130 degrees Fahrenheit. This low reading concerned Mr. Weisberg, so he tested the temperature of the cheese product by dispensing about two ounces of the product into a cup and then probing the product with his thermometer. The cheese product's temperature registered 130 degrees on Mr.

¹ Ex. 1.

² Testimony of David Weisberg; Exs. 2 and 10.

³ Testimony of Weisberg; Testimony of Daniel Stower; Ex. 2. See St. Paul Legislative Code § 311A.11(1)(a).

⁴ Minn. Rule 4626.0395. "Potentially hazardous food" is defined in Minn. R. 4626.0020, subp. 62, as food that is natural or synthetic and is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxic production of *Clostridium botulinum*; or, in raw shell eggs, the growth of *Salmonella enteritidis*. Among other things, potentially hazardous food includes food of animal origin that is raw or heat-treated and excludes food with a pH level of 4.6 or below. Most microorganisms that can produce food-borne illness proliferate at temperatures below 140 degrees and most grow very slowly at temperatures above 140 degrees. See Minnesota Rule 4626.0395.

⁵ Testimony of Weisberg.

⁶ Testimony of Stower; Ex. 10.

Weisberg's thermometer. The City allows for a two degree margin of error when testing the temperature of food products. Therefore, when Mr. Weisberg tested the cheese product's temperature on April 10, 2009, it was between 128 and 132 degrees.⁷

6. To test food temperature, Mr. Weisberg uses a digital thermometer resembling a meat thermometer that has a metal probe approximately 2½ inches in length. His office checks and calibrates the thermometers periodically. Although Mr. Weisberg could not recall the date his thermometer was last calibrated, it was accurate within two degrees at that time and has never been found to be working improperly.⁸

7. After he completed the inspection, Mr. Weisberg went back to his office and entered the information into a data base maintained by DSI. Once all the information was entered, the computer generated an "Inspection Report" specific to the Licensee listing all the alleged food code violations identified by Mr. Weisberg, the corresponding Minnesota Rule provision, the severity of the violation, and the date by which the Licensee was required to correct the violation.⁹

8. After his discussion with Mr. Weisberg, Mr. Stower informed Mark Lindsey, District Manager for SuperAmerica, about Mr. Weisberg's findings. Mr. Lindsey directed Mr. Stower to contact Gehl's Guernsey Farms, Inc. (Gehl's), which supplies the chili and cheese products used by the Licensee and also manufactures the dispenser used by the Licensee. Mr. Lindsey, who is also a certified food manager, came to the store later that day. He checked the temperature on the chili and cheese machine with his own thermometer and found it to be proper. Based upon the information provided by Mr. Stower, Mr. Lindsey believed that Mr. Weisberg had only looked at the thermometer on the side of the machine before finding a violation.¹⁰

9. According to the information later provided by Gehl's in an undated letter to the Licensee, the "bag-in-box" cheese sauce is potentially hazardous after opening and should be maintained at 140 degrees Fahrenheit.¹¹ The dispenser has a controlled thermostat that cycles between 130 and 160 degrees Fahrenheit. According to Gehl's, the sauce remains above 140 degrees Fahrenheit once it is properly preheated. The thermometer on the outside of the dispenser reflects the temperature of the system's return hot air, which fluctuates when the thermostat is cycling, and does not show the temperature of the cheese or chili sauce. Gehl's indicated that the proper method for obtaining an accurate temperature of the chili and cheese products is to remove the valve guard on the

⁷ Testimony of Weisberg; Ex. 2.

⁸ Testimony of Weisberg.

⁹ Testimony of Weisberg; Ex. 2.

¹⁰ Testimony of Stower and Mark Lindsey.

¹¹ Ex. 10. The letter indicated that the cheese sauce has a pH level of 5.2 – 5.8 and water activity of 0.987.

plastic bag and probe the contents of the bag with a thermometer.¹² In the letter to the Licensee, Gehl's stated that, if the chili or cheese products were below the required 140 degree temperature, it was likely due to one of five things:

1. The product not being preheated to 140 degrees prior to serving;
2. The lid not on securely causing hot air to escape;
3. The valve guard not on;
4. Low voltage-too much wattage being pulled from the outlet; or
5. Bag not probed for temperature or too small of a sample evaluated.¹³

10. According to Gehl's, to properly preheat the chili or cheese product, a second unopened bag of the product should be placed in the dispenser on top of the open bag that is dispensing the product. That way, while one is dispensing, the other is preheating to the proper temperature.¹⁴ Mr. Stower and Mr. Lindsey generally follow that practice.¹⁵

11. On April 13, 2009, Bill Gunther, DSI's Environmental Manager, issued a Notice of New Critical Violations to the Licensee. The Notice advised the Licensee of the critical food code violation and the other violations identified at its store during the City's April 10th inspection. The Notice further stated that failure to correct any of the food code violations could result in adverse action against the store's license. Mr. Gunther attached a copy of the Inspection Report to the Notice, and informed the Licensee that all the violations had to be corrected by the date indicated in the report. The Notice specifically highlighted the critical food code violation stating that the Licensee's hot food holding equipment had been found to be maintaining readily perishable food at less than 140 degrees Fahrenheit in violation of Minnesota Rule 4626.0395. The Notice directed the Licensee to correct this violation by May 10, 2009, by providing "adequate, approved hot holding equipment to maintain hot readily perishable foods at 140 degrees Fahrenheit or higher except during preparation, cooking or cooling."¹⁶

12. The Notice advised the Licensee that the City would conduct a re-inspection of the store on or after May 10, 2009, to verify that the identified violations had been corrected. The Notice further informed the Licensee that any violations not corrected would be referred to the City Attorney's Office for

¹² Ex. 10; Testimony of Stower.

¹³ Ex. 10.

¹⁴ Ex. 10.

¹⁵ Testimony of Stower, Lindsey.

¹⁶ Ex. 3.

possible adverse action including a fine, license suspension, and/or license revocation.¹⁷

13. On May 14, 2009, Mr. Weisberg conducted a second inspection of the Licensee's store to see if it had corrected the food code violations identified on April 10th. Mr. Weisberg noted that the thermostat on the outside of the chili and cheese container again registered 130 degrees Fahrenheit. Mr. Weisberg tested the temperature of both the chili and cheese toppings using the same method of dispensing about 2 ounces of the product into a cup and probing the product with his thermometer. On this date, the temperature of the cheese product was 127.7 degrees Fahrenheit and the temperature of the chili product was 129.9 degrees Fahrenheit.¹⁸

14. Both the chili and cheese products are very viscous foods and will not cool that rapidly. It is unlikely that chili and cheese held at 140 degrees Fahrenheit would cool to temperatures below 130 degrees Fahrenheit in the time it takes to dispense about two ounces of the product and measure the products' temperature with a thermometer.¹⁹

15. After Mr. Weisberg obtained the temperature readings of the chili and cheese products, he informed the store manager that he had found a repeat critical food code violation and that the store would hear from the City in the near future regarding adverse licensing action.²⁰

16. In addition to finding that the critical food code violation concerning the temperature of the chili and cheese product had not been corrected, Mr. Weisberg also found that several non-critical violations had not been corrected since the last inspection. Mr. Weisberg listed the Licensee's various food code violations in a second Inspection Report dated May 14, 2009.²¹

17. On May 15, 2009, Mr. Gunther submitted a memo to the City's Director of Licensing, Christine Rozek, recommending that the City take adverse licensing action against the Licensee based on its repeat critical food code violation. Mr. Gunther explained that the Licensee's hot food holding equipment was continuing to maintain readily perishable food at less than 140 degrees Fahrenheit. Mr. Gunther recommended that the Licensee be assessed a penalty in the amount of \$200 for failing to correct the violation.²²

18. Ms. Rozek accepted Mr. Gunther's recommendation and forwarded his memo to the City Attorney's office.²³

¹⁷ Ex. 3.

¹⁸ Testimony of Weisberg; Ex. 4.

¹⁹ Testimony of Weisberg.

²⁰ Testimony of Weisberg.

²¹ Testimony of Weisberg; Ex. 4.

²² Ex. 5; Testimony of Christine Rozek.

²³ Testimony of Rozek.

19. By letter dated June 1, 2009, Rachel Tierney, Assistant City Attorney, notified the Licensee that, based on its uncorrected critical food code violation, the City would recommend suspension of its licenses until the violation has been corrected and assessment of a \$200 penalty. Ms. Tierney informed the Licensee that it could correct the violation and pay the penalty, admit the facts but contest the penalty at a public hearing before the City Council, or request a hearing before an Administrative Law Judge.²⁴

20. On June 5, 2009, at the request of Mr. Lindsey, Mr. Weisberg returned to the Licensee's store to re-check the temperatures of the chili and cheese products. Mr. Lindsey explained to Mr. Weisberg what Gehl's had told the Licensee about the external thermometer. Mr. Weisberg conducted the temperature test of the products in the same manner he had on his prior visits. He dispensed approximately 2 ounces of the product into a cup and measured the temperature by probing the product with his calibrated thermometer. Mr. Weisberg obtained an initial reading of about 135 degrees Fahrenheit for both the chili and cheese products. However, after waiting about five minutes, Mr. Weisberg obtained temperature readings of about 142 degrees Fahrenheit for each product.²⁵

21. By e-mail dated June 8, 2009, Mr. Weisberg informed Julie Kraus of the City Attorney's Office that the Licensee was now in compliance with the food code.²⁶

22. On or about June 9, 2009, the Licensee submitted a request for a hearing on the violation and proposed \$200 penalty.²⁷

23. On June 24, 2009, the City issued a Notice of Administrative Hearing, scheduling the hearing to take place on July 30, 2009.²⁸

24. The hearing took place as scheduled on July 30, 2009, and the OAH record closed with the conclusion of the hearing on that day.

25. The heating device on the dispensing machine cannot be adjusted to a higher temperature.²⁹

26. On several occasions during the first two weeks of July 2009, Mr. Stower tested the temperature of the chili and cheese products by removing the valve and probing the contents of the bags with a thermometer in the manner

²⁴ Ex. 6.

²⁵ Testimony of Weisberg, Lindsey.

²⁶ Ex. 7.

²⁷ Ex. 8.

²⁸ Ex. 9.

²⁹ Testimony of Stower and Lindsey.

recommended by Gehl's. On these occasions, the chili and cheese products registered temperatures between 140 and 144 degrees Fahrenheit.³⁰

27. The Licensee generally has had more food safety compliance passes than failures and has responded promptly to any concern raised by DSI.³¹

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable portions of the procedures set forth in section 310.05 of the St. Paul Legislative Code.

3. The City gave proper notice of the hearing in this matter and has fulfilled all procedural requirements of rule or law.

4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by Speedway SuperAmerica Store.

5. The St. Paul City Council may take adverse action against any or all licenses or permits, licensee or applicant for a license, on the basis that the licensee or applicant has failed to comply with any condition set forth in the license or has violated any of the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.³²

6. The Minnesota Food Code, which is set forth in Minn. Rules part 4626, applies to food establishments licensed and inspected by local authorities that conduct inspections of food establishments, as well as those licensed and inspected by the Department of Agriculture and the Department of Health.³³

7. Under St. Paul Legislative Code § 331A.11, violation of the state food code is grounds for adverse licensing action. The presumptive penalty under the St. Paul Legislative Code for a first time critical violation of the food code is a \$250 fine.³⁴

³⁰ Ex. 12; Testimony of Stower and Lindsey.

³¹ Testimony of Rozek.

³² St. Paul Legislative Code § 310.06 (b)(6)(a).

³³ Minn. R. 4626.0017.

³⁴ Saint Paul Legislative Code § 310.05(m).

8. Minnesota Rule 4626.0395 requires that potentially hazardous foods be maintained at 140 degrees Fahrenheit or above, except during preparation, cooking or cooling.

9. "Potentially hazardous foods" means a food that is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms.³⁵

10. The chili and cheese products sold at the Licensee's store meet the definition of "potentially hazardous foods" and were required to be maintained at 140 degrees Fahrenheit or higher.

11. The City demonstrated by a preponderance of the evidence that, on April 10 and May 14, 2009, the Licensee failed to maintain the chili and cheese products at 140 degrees Fahrenheit or higher in violation of Minnesota Rule 4626.0395.

12. The City's recommendation to assess a \$200 civil penalty against the Licensee is reasonable and should be affirmed.³⁶

Based upon these Conclusions, and for the reasons explained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

RECOMMENDATION

It is respectfully recommended that the St. Paul City Council take adverse action against the licenses held by Speedway SuperAmerica Store, d/b/a Speedway SuperAmerica Store, for the premises located at 390 Maryland Avenue East, St. Paul.

Dated: August 25, 2009

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally recorded,
No transcript prepared

³⁵ Minnesota Rule 4626.0020, Subp. 62A (1).

³⁶ See St. Paul Legislative Code § 310.05(m) (Presumptive penalty for critical violation under administrative enforcement of state food code § 311A is \$250.)

NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to find out the process for presenting argument.

MEMORANDUM

The City has established that, on April 10 and May 14, 2009, the Licensee's chili and cheese products were not maintained at 140 degrees Fahrenheit or warmer as required by Minnesota Rule 4626.0395. This violation of the food code is characterized as "critical (major)" meaning that it posed an imminent public health risk by placing consumers at a high risk of food-borne illness. Hot food held at below 140 degrees is particularly susceptible to the growth of bacteria that can lead to food-borne illnesses.

The Licensee argues that the City did not properly test the temperature of its chili and cheese products. The Licensee contends that to get an accurate reading of the products' temperature, the City inspector should have probed the contents of the product inside the dispensing bags as recommended by the products' supplier. According to the Licensee, by the time the inspector dispensed two ounces of the product into a cup for testing, the product cooled and fell below the required 140 degrees. The Licensee also suggests that two ounces of the product was too small a sample to get an accurate reading of the products' temperature.

The Administrative Law Judge is not persuaded by the Licensee's arguments. On the days inspected, both the chili and cheese were found to be 10 degrees or more below the required 140 degree mark. It is unlikely that the products would have cooled that rapidly in the time it took Mr. Weisberg to dispense two ounces into a cup and obtain a reading on his thermometer. In addition, it is reasonable to test the product as dispensed since that is the manner by which consumers would obtain the product. Finally, the Licensee's claim that the inspector should have tested the temperature by probing the contents of the bags with his thermometer raises contamination concerns. The Administrative Law Judge finds that the manner in which Mr. Weisberg tested the

products was appropriate and there is nothing in the record to suggest that his thermometer was not calibrated or that his readings were inaccurate for some other reason.

Violation of the state food code is grounds for adverse licensing action. The record demonstrates that the Licensee on two occasions failed to meet the standards of the Food Code with respect to food temperature control. Therefore, the City has demonstrated by a preponderance of the evidence that good cause exists to take adverse action against the licenses held by Speedway SuperAmerica Store. The proposed \$200 penalty is reasonable under the St. Paul Legislative Code, but ultimately the sanctions and conditions to be imposed for this conduct are within the discretion of the St. Paul City Council.

B.L.N.